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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:

Baita Real Estate, Inc.,

Debtor.

CASE NO. 02-90297

CHAPTER 7

JUDGE MASSEY

Martha A. Miller, in her official capacity as Chapter 7 Trustee for the Bankruptcy Estate of Baita Real Estate, Inc.; Ricco Gartmann; Marco Moro; Gerard Staubli; Yvette Staubli; Franz-Xaver Muheim and Kleinert Investment, AG,

Plaintiffs,

v.

ADVERSARY NO. 04-6678

Peter S. Bratschi and Baita International, LLC,

Defendants.

ORDER DENYING MOTION TO ALTER, AMEND AND RECONSIDER ORDER

Defendant Peter S. Bratschi moves for an order altering, amending and reconsidering this Court's Order entered on April 25, 2005 denying his motion to dismiss the complaint on the ground that Plaintiff Martha Miller's withdrawal of an amended complaint effected a dismissal of this adversary proceeding. The Court always appreciates a second chance to correct an error, but in this instance, the Court does not believe that it erred.

Seven Plaintiffs filed the complaint initiating this adversary proceeding on December 29, 2004. Martha Miller is a plaintiff in her capacity as the Chapter 7 Trustee for the bankruptcy estate of the Debtor, Baita Real Estate, Inc. Ms. Miller, an attorney, represents herself as Trustee, along with the firm of Ragsdale, Beals, Hooper & Seigler, LLP., and both Ms. Miller and William Russell Patterson, Jr., who is a member of the Ragsdale firm, signed the complaint. W. Kevin Snyder, of the firm of Parker, Hudson, Rainer & Dobbs, LLP, representing Plaintiff Kleinert Investment, AG, also signed the complaint by authorizing Ms. Miller to sign his name. Craig K. Pendergrast of the firm of Paul, Hastings, Janofsky & Walker, representing the remaining defendants, also signed the complaint by authorizing Ms. Miller to sign his name.

On January 25, 2005, Plaintiffs, through the same attorneys, filed an amended complaint. The amended complaint dropped as Plaintiffs three of the five clients of Paul, Hastings. The amended complaint states in its second sentence, "[t]his amended Complaint supersedes in its entirety the Complaint filed on December 29, 2004."

On January 28, 2005, Martha Miller filed a document entitled "Withdrawal of Amended Complaint." The document states, "COME NOW the Plaintiffs, Martha A. Miller, in her capacity as Chapter 7 Trustee for the bankruptcy estate; Ricco Gartmann; Marco Moro; and, Kleinert Investment, AG, creditors of Baita Real Estate Investment Inc. ("Debtor") and withdraws the Amended Complaint filed in the above-captioned matter on January 25, 2005." Although the document purports to have been filed by all Plaintiffs, only Ms. Miller signed it, as "Counsel for Plaintiff," not Plaintiffs. Ms. Miller could not represent Plaintiffs other than herself because her client is a fiduciary whose loyalty is only to the bankruptcy estate.

Defendant Bratschi argues that in filing that document, Ms. Miller effectively dismissed the adversary proceeding. In other words, according to Defendant, if a plaintiff files a document withdrawing an amendment to a complaint and if the amendment states that it supercedes the original complaint, that plaintiff has voluntarily dismissed the action pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure. Rule 7041 of the Federal Rules of Bankruptcy Procedure makes Civil Rule 41 applicable in bankruptcy with an exception not relevant to the issue before this Court. Civil Rule 41(1)(a) states:

> Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

The document filed by Ms. Miller in its title and in the body purports to withdraw the amended complaint. Nothing in the document suggests that Ms. Miller intended to dismiss the action. Defendant does not contend that her intent was to dismiss the action. His argument is a formalistic one that depends for its validity the acceptance of the proposition that the word "withdrawal" is the functional equivalent of the words "voluntary dismissal" when used to refer to an amended complaint.

Defendant attempts to support that argument with references to three cases. He states:

> In support of treating the withdrawal as a Rule 41(a)(1) dismissal notice, Movant shows that Courts use the term "withdrawal of complaint" interchangeably with voluntary dismissal under Rule 41(a)(1). As Justice Stevens explained: "Rule 41(a)(1) permits a plaintiff who decides not to continue a lawsuit to withdraw his complaint before an answer or motion for summary judgment has been filed and

> avoid further proceedings on the basis of that complaint." Cooter & Gell v. Hartmarx Corporation, 496 U.S. 384, 409 (1990)(Stevens, J., concurring in part, dissenting in part)(emphasis added); See also Omnibus Financial Corp. v. U.S., 566 F.2d 1097, 1102-03, n.26 (9th Cir. 1977)(treating voluntary withdrawal of a complaint as voluntary dismissal); Van Eck Associates, Inc. v. Reynolds Philippine Corporation, 1999 WL 562005 at *1 (S.D.N.Y. Aug. 2, 1999)("Plaintiff has withdrawn its Complaint by notice pursuant to Fed R Civ. P. 41(a)(1)(i)."). As such, Plaintiffs' withdrawal of complaint is properly read as a Rule 41(a)(1) notice.

None of these cases supports Defendant's argument. The reference to *Cooter & Gell* is particularly misplaced. In that case, the plaintiff filed an antitrust complaint. Defendants responded with a motion to dismiss and a motion for the award of sanctions under Rule 11. A few months thereafter, "[i]n April 1984, petitioner [the plaintiff below] filed a notice of voluntary dismissal of the complaint, pursuant to Rule 41(a)(1)(i). The dismissal became effective in July 1984, when the District Court granted petitioner's motion to dispense with notice of dismissal to putative class members." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. at 389. The issue in that case had nothing to do with whether a withdrawal of an amended complaint is the equivalent of a voluntary dismissal. The issue was whether the District Court properly imposed Rule 11 sanctions on the plaintiff when it dismissed the case voluntarily before an answer had been filed. Concurring in and dissenting from the Court's decision, Justice Stevens agreed that "dismissal of an action pursuant to Rule 41(a)(1) does not deprive the district court of jurisdiction to resolve collateral issues," *id.* at 412, but he dissented from the Court's holding that a voluntary dismissal "does not eliminate the predicate for a Rule 11 violation." *Id.* at 411.

This Court has reviewed the facts in detail because only in understanding the facts of a case can anyone discern the true value of words used in it. Defendant quotes Justice Stevens' remark that "Rule 41(a)(1) permits a plaintiff who decides not to continue a lawsuit to withdraw his complaint before an answer or motion for summary judgment has been filed and avoid further

proceedings on the basis of that complaint." *Id.* at 409. The argument that Defendant makes from this language borders on the disingenuous because plaintiff in that case did not file a "withdrawal" of the complaint but rather filed "a notice of voluntary dismissal of the complaint, pursuant to Rule 41(a)(1)(i)." *Id.* at 389. In effect, Defendant suggests that Justice Stevens' use of the word "withdraw" means that he necessarily viewed a withdrawal as the functional equivalent of a voluntary dismissal. Defendant's argument is specious.

Defendant's reliance on the *Omnibus Financial Corp.* case is likewise misplaced. There, the plaintiffs, a corporate taxpayer and its subsidiary, sued two I.R.S. agents to recover damages for an alleged wrongful seizure of property of the subsidiary. Later they attempted by amendment of the complaint to add the United States as a defendant. Defendant Bratschi says that this case involved "treating [a] voluntary withdrawal of a complaint as [a] voluntary dismissal," but he overstates what the holding was.

The relevant issue in that case was "[w]hether the District Court erred in not ordering the pleadings to be amended to include the United States as a party under 26 U.S.C. §§ 7422 and 7426." *Id.* at 1099. The Court resolved the § 7422 issue in the Government's favor because an action under that section required the filing of a claim for a refund, which the plaintiffs had failed to do. As to section 7426, plaintiff Arizona Turf, the subsidiary, argued that the District Court had not treated the withdrawal as a dismissal and therefore should have ordered that the United States be substituted for the individual defendants. The Government argued that the withdrawal effectively dismissed the case. The Court of Appeals danced around this issue based on plaintiffs' concession that the initial complaint failed to state a claim for relief. The original complaint was

filed within the nine month limitations period, but the amended complaint was filed after the limitations period had expired. The Court of Appeals held:

> In the light of this earlier concession [that the original complaint did not state a claim for relief] and the subsequent withdrawal of the Original Complaint, we must support the District Court on this last issue of whether Arizona Turf can proceed against the United States under 26 U.S.C. § 7426, because any further amended complaint could only relate back to March 9, 1972 [the date of the filing of the amended complaint], and therefore would be barred by the nine month statute of limitations.

Omnibus Financial Corp., 566 F.2d at 1102 -1103. Thus, the decision was based on two grounds: first, that the District Court did not err in construing the withdrawal as a voluntary dismissal based on the fact that the dismissal preceded the amendment and, second, that any amendment could not relate back because the first complaint failed to state a claim.

The third case cited by Defendant is also inapposite. The District Court said that "Plaintiff has withdrawn its Complaint by notice pursuant to Fed R Civ. P. 41(a)(1)(i)." Van Eck Associates, Inc., 1999 WL 562005 at *1. This statement shows that the plaintiff filed a "notice" that referenced Civil Rule 41(1)(a). The Court may have intended the words "Plaintiff has withdrawn its complaint" as a description of the effect of filing notice of voluntary dismissal or as a literal statement that plaintiff filed a document saying it was withdrawing the complaint pursuant to the rule. Either way, the quoted language makes it clear that the document filed by the plaintiff in that case was intended by the plaintiff to dismiss the case.

The facts in the present case are easily distinguishable from the facts in the cases cited by Defendant. First, in the *Cooter* and *Van Eyk* cases, the plaintiff invoked Civil Rule 41(1)(a). Here, Ms. Miller did not file a notice of dismissal as required by Civil Rule 41 or even mention that rule or Bankruptcy Rule 7041. The plaintiffs in the *Omnibus* case apparently filed a

document withdrawing the complaint prior to filing an amendment, which the trial court construed as a notice of dismissal. This Court declines to construe the document filed by Ms. Miller as a notice of dismissal, Defendant not having alleged or proved facts to justify such a construction of the withdrawals of the first or second amended complaints.

Second, in all three cases cited by Defendant, the dismissal related to the initial complaint. Here, the withdrawal was directed to an amended complaint. Third, only one of the plaintiffs filed a withdrawal document here, whereas all of the plaintiffs in the cases cited by Defendant filed the document leading to dismissal.

Fourth, in the *Cooter* and *Van Eyk* cases, there was no question but that the intent of the plaintiff was to dismiss the case. In the *Omnibus* case, the plaintiffs claimed that they did not intend to dismiss the case, but this argument was not enough to carry the day. The Court of Appeals refused to second-guess the district judge and relied heavily on the fact that the withdrawal predated the amendment and that the amendment was insufficient to relate back to the original complaint because it failed to state a claim. Here, Defendant does not contend that Ms. Miller intended to dismiss this adversary proceeding.

Fifth, the metaphysical problem facing the Court of Appeals in the *Omnibus* case was how it could be possible to amend a complaint withdrawn before the amended complaint was filed. That problem does not exist here, notwithstanding the language in the amendment that it superceded the first complaint. It is clear to the Court, and Defendant does not argue otherwise, that Ms. Miller did not intend to dismiss the proceeding but rather intended to withdraw the filing of the entire first amended complaint, including the language that it superceded the original complaint. She was attempting to withdraw the filing of that document to go back to the original

complaint, but since the withdrawal was itself an amendment, she had to have the Court's permission to do so for the reason stated in the April 25 Order. This conclusion is warranted not only because Defendant failed to allege or prove facts showing that the withdrawal was intended to be a notice of dismissal, but also because Defendants and Plaintiffs entered into a joint stipulation dated and filed on January 31, 2005 in which the parties agreed that "the deadline for Defendants to file an answer, move, or otherwise respond to the Complaint and/or the Amended Complaint [was extended] through and including February 22, 2005." This stipulation shows that Defendants knew about the amended complaint, which had been filed on January 25. Yet, they did not consider the amended complaint to have superceded the original complaint, as the amendment stated, because they extended the time to file an answer to either or both complaints. If the January 28 withdrawal effected a dismissal, the stipulation was unnecessary, though the Court recognizes that counsel for Defendant Bratschi may have been unaware of the withdrawal on January 31.

Like the April 25 Order, this Order does not resolve the issues raised by Defendant Bratschi regarding whether an amendment to the complaint would relate back to the original complaint for statute of limitations purposes or whether the original complaint stated a claim. The Court has yet to rule on those portions of his motion to dismiss.

For these reasons, it is

ORDERED that Defendant Peter S. Bratschi's motion to alter, amend and reconsider this Court's Order entered on April 25, 2005 is DENIED.

Dated: May 18, 2005.

James E. Massey

JAMES E. MASSEY
U.S. BANKRUPTCY JUDGE